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P. James Fyfe

February 5. 1771.

8th Feb^r 1771.

Refuse

UNTO THE RIGHT HONOURABLE,

The Lords of Council and Session,

THE

PETITION

OF

JAMES FYFE tenant in Wellshill,

Humbly sheweth,

THAT, of this date, Thomas Gall executed a disposition of two yards on the south side of the Southgate of Perth; whereby, "for certain onerous causes, and good and weighty considerations moving him, wherewith he held himself satisfied, renouncing all objections or exceptions proponable in the contrary," he disposed the same, in favour of Helen Gall, daughter of Patrick Gall, his brother-german, and her heirs and assignees, heritably and irredeemably: and on the procuratory in this disposition, Helen Gall was infest.

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Nov. 30. 1742

A contract of marriage was, of this date, executed betwixt Helen Gall and the petitioner; by which it was provided, that in the event of her predeceasing the petitioner, she should have power to bequeath to any person she pleased, not only her body cloaths and *paraphernalia*, but likewise the sum of 500 merks Scots; and that the petitioner should further pay to several persons her friends, by the divisions therein specified, the sum of 1000 merks Scots: and in the event of her surviving the petitioner, he became bound to pay to her the sum of 3500 merks Scots, at the first term after his death; besides the half of his whole household plenishing and furniture. It was further provided, That she should enjoy the annual rent, use, and possession, of the petitioner's whole estate, heritable and moveable until the children (in case there were any existing) should attain the age of eighteen years complete; and that she should then divide the property of the whole with them, she receiving one third, and two thirds going to the children.

For these causes, and on the other part, Helen Gall made over to the petitioner the above-mentioned two yards, which had been disposed to her by Thomas Gall; and upon this right the petitioner, and those who possessed under him, have enjoyed these subjects from 1742 downwards.

A challenge has been lately brought of the petitioner's right at the instance of Thomas Gall, eldest son of the above-mentioned Thomas Gall tailor in Perth, who insists in a reduction on the head of deathbed, of the foresaid disposition granted by his father to Helen Gall the petitioner's wife.

This process having come before the Lord Stonefield as Ordinary, his Lordship, after allowing a proof of the deathbed, was pleased, on 20th November 1770, to pronounce this interlocutor. "The Lord Ordinary having considered the libel
" proof adduced, and writs produced, with the deed under reduction; finds the deathbed libelled relevant and proven; re
" duces the deed under challenge; and decerns and declares accordingly." And to this interlocutor, upon advising a representation

presentation, with answers, his Lordship was pleased, on 22d January 1771, to adhere.

The petitioner, whose case is extremely hard, submits the same to the review of your Lordships, in hopes of obtaining relief. He has possessed this subject from 1742 downwards without challenge, and without having any reason to doubt that his right of property was unquestionable. In this belief he has laid out much money upon it, without even thinking of preserving the vouchers of his disbursements; and, in full confidence of his right, he sold a part of the ground, upon which a large building has been erected by the purchaser; the consequence of which might be ruin to the petitioner if his right should be reduced, and the purchaser allowed to recur upon his warrantice. In these circumstances, the petitioner persuades himself, that every argument in support of his plea will be favourably received.

In the first place, then, the petitioner is hopeful your Lordships will be of opinion, that the reduction upon the head of deathbed, insisted on by the pursuer, cannot take place in the present case. The law of deathbed is a valuable law, and highly useful for the purposes for which it was intended, viz. to provide for the security of heirs, by disabling their predecessors from making gratuitous deeds to their prejudice, while on deathbed. But this prohibition relates only to such deeds as are gratuitous; and does not bar any person from granting, even on deathbed, such deeds as may affect his heir, providing the same be granted for onerous or necessary causes.

That such is the disposition of the law, and that a dying person may for certain causes execute deeds concerning his heritage; though he cannot affect the same by a deed merely gratuitous, is a point so certain and well established, that it would be superfluous to quote authorities in support of it.

And that the disposition here sought to be reduced is not gratuitous, but granted for onerous causes, appears clear from the conception of the deed itself; the granter of which declares the same to be granted "for certain onerous causes, and good and
" weighty

“ weighty considerations moving me, wherewith I hold myself
 “ satisfied, renouncing all objections or exceptions proponable
 “ in the contrary.”

It is true, that in reductions upon the act of parliament 1621, of dispositions in favour of conjunct and confident persons, it is a rule, that the narrative of the deed is not a sufficient proof of its onerosity; but the person in whose favour the same is granted, is obliged to asstruct, in some other way, the onerosity thereof. And this rule is extremely reasonable in reductions upon the act 1621, because such dispositions being granted in favour of conjunct or confident persons, and to the prejudice of creditors, the law presumes that the granter of the deed may be too apt to give a false account of the cause thereof, in order to support the same in favour of his friend to whom he grants it, when it is only stranger creditors who are thereby to suffer prejudice.

But the present case is extremely different: for the person who was to suffer by the disposition in question, was the grant-er's own son; and it is a presumption which cannot be founded in law, because it is contrary to reason, and to nature itself, that a man would grant a deed upon a false narrative of onerosity, merely to defraud and disappoint his own son in the succession. This is what can neither be presumed nor believed; and therefore it cannot be doubted, that the disposition granted by Thomas Gall to the petitioner's wife, was given for onerous causes, as the deed itself bears, and so cannot be subject to reduction on the head of deathbed.

But further, the petitioner apprehends, that whatever might be said with respect to Helen Gall, the original disponee; yet he falls to be considered as a singular successor, or *bona fide* purchaser, in this case, which of itself ought to protect him from the challenge on the head of deathbed. The subjects contained in the disposition in question, were made over to the petitioner by his wife in the antenuptial contract of marriage which was executed by them. This the law holds to be the most onerous of all contracts. The petitioner, in consideration of the subjects conveyed

conveyed to him by his wife, and as the counter part of the contract, settled in her favour, provisions very high for his circumstances, and such as he could not have afforded, except in the view of what he supposed he was receiving with her; not only giving her an annuity, but conveying to her considerable sums in property, and to be at her own disposal. Upon this contract the marriage followed; and it will be hard, if the petitioner should now, after so many years possession, be deprived of subjects which he acquired by a most solemn deed, and for the most onerous of causes.

In questions upon the above-mentioned act of parliament 1621, concerning alienations granted contrary to the prohibitions of that statute; though such alienation may be reduced in the person of him in whose favour it was made, at the instance of a creditor to whose prejudice it was granted; yet, when the subject has passed from the original disponent, and comes to belong, for onerous causes, to a *bona fide* purchaser, it is no longer reducible in the person of such purchaser: and as deeds granted contrary to the act 1621, to the prejudice of lawful creditors, are fully more obnoxious in the eye of law, than any disposition granted upon deathbed, it seems *ex paritate rationis* to follow, that in a question like the present, relative to a deathbed-disposition, a third person acquiring the subject for an onerous cause, as the petitioner did in this case, ought to be secure from any challenge which might be competent against the original disponent.

Besides, as the public records of this country are understood to give the most perfect security, in relation to the right of every heritable subject, and all ground of challenge and incumbrance affecting the same, it seems necessary, in order to support so valuable a system, that the law should not allow the petitioner, upon a latent objection, which could not be discovered from any record, to be deprived of an heritable subject of which he had so long held the possession, and of which he had so much reason to believe himself the unquestionable proprietor.

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The petitioner is hopeful, that, upon these grounds, your Lordships will be of opinion, that he ought to be assilzied from the pursuer's process, even independent of any objections to the proof of deathbed, which he apprehends is not sufficiently instructed by the witnesses adduced by the pursuer, whose evidence is vague and inconclusive. Several of them do indeed mention a deed having been signed by Thomas Gall eight or ten days before his death; but there is not one of them who says, that the deed so executed was the disposition in question. On the contrary, they give reason to believe, and many of them expressly say, that the deed which they allude to was not the disposition to the petitioner's wife, but a deed in favour of Lilius Gall, the sister of Thomas Gall: and surely a deed cannot be set aside as granted on deathbed, except upon such evidence as does expressly, clearly, and pointedly, apply to it.

May it therefore please your Lordships, to alter the Lord Ordinary's interlocutors, and to assilzie the petitioner.

According to justice, &c.

W. NAIRNE.